Supreme Court, U.S.
FILED
DEC 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-443

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Petitioner,

v.

ADAMS HOUSE HEALTH CARE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

EUGENE TILLMAN *
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for Respondents In Docket No. 85-1512 Below

* Counsel of Record

December 5, 1987

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BRIEF IN OPPOSITION

The respondents [1] respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, filed by the Solicitor General

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[1] The judgment of the United States Court of Appeals for the Ninth Circuit involved two cases which were consolidated at oral argument, Nos. 85-1512 and 86-1872. The instant brief is filed solely on behalf of the respondents which were appellees in No. 85-1512. Those respondents are wholly owned by the Hillhaven Corporation, which is a wholly-owned subsidiary of National Medical Enterprises, Inc.

on behalf of the Secretary of Health and Human Services ("Secretary"), should be denied.[2]

ARGUMENT

I. THIS CASE DOES NOT POSE AN ISSUE OF SUFFICIENT IMPORTANCE TO JUSTIFY GRANTING THE SECRETARY'S PETITION

There are no "special and important reasons" which support the grant of a writ of certiorari in this case. Supreme Court Rule 17.1. The only question of law involves a particular cost reporting practice by some Medicare providers which has largely been abandoned since 1981. Further, that question of law arises from a statutory reimbursement scheme which for most providers has been superseded by the wholly new prospective payment system which Congress mandated in 1983. As a result, the legal issue in the instant case is little more than an historic relic of merely academic interest which does not merit review by this Court.

A. Providers Have Generally Discontinued The Practice Of Raising Reimbursement Disputes First With The PRRB

The instant case is one of several so-called "self-disallowance" cases. *See infra* note 6. "Self-disallowance" occurs when a health care provider seeking reimbursement under the Medicare program submits a cost report to the Secretary's fiscal intermediary and, on the cost report, lists and then deducts certain costs which are specifically disallowed under the Secretary's rules and policies. In the past, when a provider believed that the rule

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[2] We note that the Court has granted a writ of certiorari in No. 86-1764, *Bethesda Hospital Ass'n v. Bowen*, which involves the same legal issue as the instant case. To the extent the Court wishes to treat the two cases similarly, we submit that the Court should deny the petition in the instant case and dismiss the writ of certiorari as improvidently granted in *Bethesda Hospital*.

or policy requiring a particular self-disallowance was unlawful under the Social Security Act, the provider typically would challenge the disputed rule or policy in the first instance before the Provider Reimbursement Review Board ("PRRB").[3] This practice was fairly widespread in the 1970's and, to a lesser extent, in the very early 1980's.

Although the PRRB at the start did not question its jurisdiction where the provider had complied with the challenged rule or policy by effecting the required self-disallowance, it began declining to review such matters in the late 1970's. Those decisions implemented the Secretary's revised interpretation of 42 U.S.C. § 1395oo(d) to require disputes over self-disallowed costs to be presented initially to the fiscal intermediary, even though the intermediary is a private contractor with no authority to set aside or disregard the Secretary's rules and policies.[4] Although that interpretation was brand new and contravened existing practice at the time, the agency never issued a formal statement of its position. Instead, the Secretary's interpretation of Section 1395oo(d) was disseminated to the industry slowly and haphazardly over a period of several years through the medium of PRRB decisions.[5]

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[3] Congress created the PRRB to give providers a means of obtaining administrative review over their Medicare reimbursement disputes. Social Security Amendments of 1972, Pub. L. No. 92-603, § 243, 86 Stat. 1328 (1972); *see also* S. Rep. No. 92-1230, 92d Cong., 2d Sess. 248-49 (1972).

[4] This hypertechnical view of the PRRB's jurisdiction (*see infra* pp. 7-10) had the anomalous effect of penalizing providers which filed cost reports in compliance with the Secretary's rules and policies.

[5] *See generally* Athens Community Hosp., Inc. v. Schweiker, 686 F.2d 989, 996 (D.C. Cir. 1982) (recognizing earlier PRRB decisions which considered disputes over self-disallowed costs which had not been presented to the fiscal intermediary).

Once Medicare providers and their counsel became aware of the various PRRB decisions, and learned that those decisions reflected the Secretary's new interpretation of the Medicare statute, they generally discontinued the practice of raising reimbursement disputes with the PRRB in the first instance. However much the providers disagreed with the Secretary's statutory interpretation, it simply was not worth the candle to adhere to contrary prior practice. Once understood, the Secretary's position was relatively easy to comply with, and lengthy, expensive and needless litigation awaited any provider who followed the prior practice.

The Secretary's actions in this case and others like it made clear that all disputes over Section 1395oo(d) would be litigated to the maximum degree permitted by law. Here, the providers' claim for approximately $52,000 has now been litigated through two lower federal courts all the way to this Court on the question of the PRRB's jurisdiction, while the providers' dispute on the merits remains the subject of separate litigation, recently stayed. in the United States District Court for the District of Columbia. Rather than run such a gauntlet, providers have generally found it far easier just to change their cost reporting practices to bring reimbursement disputes initially before the fiscal intermediary even though the intermediary lacks authority to resolve the disputes or grant the relief requested. That has been the prevailing practice since 1981.

The result is that most lawsuits in federal courts on the Secretary's interpretation of Section 1395oo(d) involved cost reports which were filed during the relatively brief period of time from the PRRB's first adherence to the Secretary's interpretation of Section 1395oo(d) in the late 1970's, to the early 1980's when news of that interpretation finally reached all segments of the industry. *Of all the published federal court decisions on this issue to date, not one involves a cost report filed later than the*

1981 fiscal year.[6] The "self-disallowance" cases appear to have been a one-time phenomenon, the by-product of a now-completed transition period to the Secretary's new regulatory regime under Section 1395oo(d) in which reimbursement disputes over self-disallowed costs are raised initially before the fiscal intermediary, not the PRRB.[7] This Court should not grant a writ of certiorari

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[6] Of the decisions which contain some statement of the fiscal year (FY) for which the cost reports were filed, see (i) *Adams House Health Care v. Heckler*, 817 F.2d 587, 589, 590 (9th Cir. 1987) (two consolidated cases involving FY 1981); (ii) *Tallahassee Memorial Regional Medical Center v. Bowen*, 815 F.2d 1435, 1442 n.9 (11th Cir. 1987) (FY 1980 & 1981); (iii) *Bethesda Hosp. v. Secretary*, 810 F.2d 558, 560 (6th Cir. 1987) (FY 1980 & 1981); (iv) *St. Luke's Hosp. v. Secretary*, 810 F.2d 325, 327 (1st Cir. 1987) (FY 1978 & 1979); (v) *University of Cincinnati v. Secretary*, 809 F.2d 307, 308 (6th Cir. 1987) (FY 1979, 1980 & 1981); (vi) *North Broward Hosp. Dist. v. Bowen*, 808 F.2d 1405, 1407 (11th Cir. 1987) (FY 1977); (vii) *Baptist Hosp. East v. Secretary*, 802 F.2d 860, 862 (6th Cir. 1986) (FY 1981); (viii) *Saline Community Hosp. Ass'n v. Secretary*, 744 F.2d 517, 518 (6th Cir. 1984) (per curiam) (FY 1979); (ix) *St. Mary of Nazareth Hosp. Center v. Department*, 698 F.2d 1337, 1339 (7th Cir. 1983) (FY 1977 & 1978); (x) *Athens Community Hosp., Inc. v. Schweiker*, 686 F.2d 989, 991 (1982), *modified*, 743 F.2d 1, 4 (D.C. Cir. 1984) (FY 1973 & 1974); (xi) *Alexandria Hosp. v. Heckler*, 660 F. Supp. 23, 24 (E.D. Va. 1985) (FY 1980); and (xii) *Our Lady of Lourdes Memorial Hosp. v. Schweiker*, No. 80-CV-226 (N.D.N.Y. July 26, 1982) (FY 1977). Although the decisions in *Community Hosp. of Roanoke Valley v. Department*, 770 F.2d 1257 (4th Cir. 1985), and *University of Michigan Hosp. v. Heckler*, 609 F. Supp. 756 (E.D. Mich. 1985), do not appear to indicate when the relevant cost reports were filed, the PRRB decisions which gave rise to those cases indicate that the cost reports were filed for FY 1977 through 1980 in the *University of Michigan* case and for FY 1977 through 1981 for the *Roanoke Valley* cases. *See* PRRB Hearing Dec. Nos. 83-D76 & 84-D17, 1984-1 Transfer Binder, Medicare & Medicaid Guide (CCH), ¶¶ 33,461 & 33,599 (Apr. 20, 1983 and Jan. 10, 1984).

[7] The Secretary claimed in his brief acquiescing to certiorari in *Bethesda Hospital* that "many disputes" involving the old reimbursement scheme are still pending. Brief for the Respondent at

to resolve a legal issue with no continuing significance to Medicare providers or the Secretary.

B. The Underlying Reimbursement Scheme Has Now Been Largely Superseded By The Prospective Payment System

The issue of whether disputes over self-disallowed costs may be raised initially with the PRRB applies only to Medicare providers which receive reimbursement on a "reasonable cost" basis. In general, providers reimbursed on that basis are paid retrospectively, based upon the providers' actual costs in furnishing services. While the respondents, as skilled nursing facilities, continue to receive reimbursement on that basis (*see* 42 U.S.C. § 1395x (v)(1)(A)), Congress in 1983 adopted a wholly new prospective payment system for most hospitals to replace the "reasonable cost" method of reimbursement. Under the new system, these hospitals are paid prospectively, based upon the "diagnosis-related group" into which individual patients fall. Social Security Amendments of 1983, Pub. L. No. 98-21, §§ 601-607, 97 Stat. 65, 149 (1983).[8]

Although the Secretary correctly points out in *Bethesda Hospital* that a few types of health care providers and categories of costs are still governed by the "reasonable cost" system (Brief for the Respondent at 13-14), the Secretary has ignored the fact that for the substantial majority of Medicare providers who are now reimbursed under the prospective payment system, the legal issue in

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14 n.12. The Secretary carefully stopped short, however, of representing that those disputes involved the legal issue at stake here, namely, whether the PRRB has jurisdiction to review reimbursement disputes not presented intially to the fiscal intermediary.

[8] The Secretary acknowledged this in his brief on the petition for a writ of certiorari in *Bethesda Hospital*. *See* Brief for the Respondent at 13.

this case is largely irrelevant.[9] Coupled with the dramatic change in self-disallowance practices since 1981, the adoption of the prospective payment system by Congress in 1983 obviates Supreme Court review of the issue at hand.

C. The Legal Issue At Stake Has No Broader Application Beyond Cases Involving Section 1395oo(d)

There are no other reasons to grant a writ of certiorari in this case. The disputed legal issue is critically dependent upon the actual words of the statute, and we are unaware of any similarly-worded statutory provision which would benefit from a decision on the merits. Such a decision would be relevant only to those few cases where providers raised reimbursement disputes over self-disallowed costs in the first instance with the PRRB under the old statutory reimbursement scheme. We do not believe an issue of such limited importance warrants review by this Court.

II. THE NINTH CIRCUIT CORRECTLY INTERPRETED SECTION 1395oo(d) TO PERMIT DISPUTES OVER SELF-DISALLOWED COSTS TO BE RAISED FIRST WITH THE PRRB

Section 1395oo(d) contains two broad grants of jurisdiction to the PRRB. Each grant, by its terms, gives the PRRB authority to hear disputes regarding the lawfulness of the Secretary's reimbursement rules and policies which were not raised initially with the fiscal intermediary.

The first grant provides that the PRRB "shall have the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report . . . ." It is not disputed that providers which

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[9] It is significant to note that with the exception of the instant case, all of the reported self-disallowance cases (*see supra* note 6) have involved hospitals.

self-disallow costs and then challenge the underlying rule or policy before the PRRB are seeking to "modify" a final determination of the fiscal intermediary.[10] Because the self-disallowed costs are included on the cost report, and because reimbursement for such costs would modify the total reimbursement awarded for that cost report, the relief sought is patently "with respect to a cost report." By itself, this provision gives the PRRB jurisdiction to hear and decide reimbursement disputes over self-disallowed costs in the first instance.

If there were any doubt as to the PRRB's jurisdiction under the first grant (and we believe there should be none), the second grant provides unambiguously that the PRRB shall have power "to make any other revisions on matters covered by such cost report (including revisions adverse to the provider of services) *even though such matters were not considered by the intermediary in making such final determination*" (emphasis supplied). This grant makes clear that Congress intended to authorize the PRRB to decide issues involving self-disallowed costs which had not been presented to the fiscal intermediary. Operating in tandem, these two jurisdictional grants underscore the PRRB's plenary jurisdiction under Section 1395oo(d) to hear all reimbursement disputes involving cost reports regardless of whether such disputes were first presented to or considered by the fiscal intermediary.

The Secretary's contrary position betrays not only the plain words of the statute, but common sense as well. The fiscal intermediary is no more than a private in-

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[10] The Secretary has defined a final determination as the intermediary's "determination of the amount of total reimbursement due the provider." 42 C.F.R. § 405.1801(a)(1). Thus, the "final determination" referenced in Section 1395oo(d) is simply a number, *i.e.*, the amount of Medicare reimbursement which the intermediary finds is due the provider under the Secretary's rules and policies.

surance company which the Secretary hires to audit cost reports (42 U.S.C. § 1395h); it is not a legal tribunal, nor does it resolve legal disputes or possess legal expertise. As the Ninth Circuit correctly noted, the intermediary lacks any authority whatsoever to resolve challenges to the lawfulness of the Secretary's rules and policies. *Adams House Health Care*, 817 F.2d at 592.[11]

The Secretary argued before the Ninth Circuit that legal issues should nevertheless be presentd to the fiscal intermediary when the cost report is filed so that the PRRB may benefit from the intermediary's views on the issue. Reply Brief for Appellant at 13. Such a procedure is unnecessary, however, because the fiscal intermediary actually participates in the PRRB proceeding as a party by filing a brief on the merits, as it did in this case. The Secretary's argument that raising reimbursement disputes for the first time before the PRRB causes practical difficulties is equally meritless. *See id.*, 817 F.2d at 592-93.

The Secretary's proposed interpretation would make a relatively straightforward provision complex for no apparent purpose other than to frustrate, through hypertechnical interpretation, the efforts of providers to obtain review of *bona fide* reimbursement disputes. When compared to the statutory language, it is clear that the whole of the Secretary's interpretation is less than the sum of its statutory parts. The Secretary would construe two broadly-worded statutory provisions—each of which by itself is drafted broadly enough to grant the PRRB jurisdiction to hear reimbursement disputes in the first instance—in such a way that neither supports PRRB juris-

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[11] The Secretary conceded this point before the Ninth Circuit. *See* Brief for Appellant at 30. *Cf.* Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) (holding that the Secretary of Health and Human Services is not estopped from enforcing the agency's rules and policies by the contrary position of the fiscal intermediary).

diction over such disputes. That interpretation is presumptively unreasonable, and the Ninth Circuit correctly rejected such an interpretation in favor of one which comports with the evident Congressional design to give the PRRB plenary jurisdiction over reimbursement disputes involving cost reports.

CONCLUSION

For the foregoing reasons, the respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

EUGENE TILLMAN *
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for Respondents
In Docket No. 85-1512 Below

* Counsel of Record

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